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No. 106

In the Supreme Court of the United States

October Term, 1961

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v.

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 106

ARNOLD GEORGE LAUER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 19–23) is reported at 287 F. 2d 633.

JURISDICTION

The judgment for the court of appeals was entered on February 8, 1961. A petition for rehearing was denied on April 12, 1961. An order by the Chief Justice extended the time for filing a petition for a writ of certiorari to and including May 22, 1961, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner had standing to challenge the constitutionality of statutory provisions defining narcotic drugs, which do not relate to the charges against him.

2. Whether, at the close of the government's case, it was prejudicial for the court, in the presence of the jury, to deny petitioner's motions for judgment of acquittal.

3. Whether the evidence showed entrapment as a matter of law.

STATUTES INVOLVED

26 U.S.C. 4705, 68A Stat. 551, provides:

> (a) GENERAL REQUIREMENT.—It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate.

26 U.S.C. 4731, 68A Stat. 557, provides in pertinent part as follows:

> Definitions.
>
> (a) NARCOTIC DRUGS.—The words "narcotic drugs" as used in this part shall mean any of the following, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:
>
> (1) Opium, isonipecaine, coca leaves, and opiate;

(2) Any compound, manufacture, salt, derivative, or preparation of opium, isonipecaine, coca leaves, or opiate;

(3) Any substance (and any compound, manufacture, salt, derivative, or preparation thereof) which is chemically identical with any of the substances referred to in clauses (1) and (2).

* * * * *

(g) OPIATE.—The word "opiate", as used in this part shall mean any drug (as defined in the Federal Food, Drug, and Cosmetic Act; 52 Stat. 1041, section 201(g); 21 U.S.C. 321) found by the Secretary or his delegate, after due notice and opportunity for public hearing, to have an addiction-forming or addiction-sustaining liability similar to morphine or cocaine, and proclaimed by the President to have been so found by the Secretary or his delegate. The Secretary or his delegate is authorized to issue necessary rules and regulations for carrying out the provisions of this subsection, and to confer or impose upon any officer or employee of the Treasury Department whom he shall designate or appoint, the duty of conducting any hearing authorized hereunder.

* * * * *

STATEMENT

Petitioner was charged in count 1 of an indictment, returned in the United States District Court for the Southern District of Indiana, with the unlawful sale on October 15, 1959, of six tablets of pantopon, a narcotic drug, in violation of 26 U.S.C. 4705(a) (App. 5).[1]

[1] "App." refers to the Appendix filed in the Court of Appeals.

Count 2 charged petitioner with an unlawful sale of approximately 3.165 grams of cocaine alkaloid on October 29, 1959 (App. 5–6). Petitioner's special answer and plea attacking the constitutionality of 26 U.S.C. 4705(a) and 4731 was denied prior to trial (App. 13–15, 18). The jury found petitioner guilty on both counts, and the court imposed a $3,000 fine and a 7½ year sentence under count 1, and a 7½-year concurrent sentence under count 2 (App. 208–210). On appeal, the conviction was affirmed (App. 210–211).

Evidence adduced at the trial may be summarized as follows:

1. On October 4, 1959, while John Smith, a drug addict, was being held in jail in Mount Vernon, Indiana, on State narcotics charges, he asked that he be permitted to speak to Alton Cherry, an Evansville police officer (App. 161–163, 167). Previously, Smith had told Cherry that he was trying to get his girl friend off the drug habit, and that he therefore wanted to get petitioner arrested and sent to prison for "pushing" narcotics (App. 47, 75, 110–111). Cherry was able to get the local prosecutor and sheriff to turn Smith over to Cherry and John Wilkie, a federal narcotics agent. The charges against Smith were left pending (App. 159, 161–163, 167–168).

Count 1: On October 15, 1959, in Evansville, Indiana, after agent Wilkie and Cherry had searched Smith, had found no narcotics and no order form, and had given him $15 in official advance funds (App. 21–22, 29–30, 37–38, 97), Smith asked petitioner if he could get some tablets. Petitioner replied in the affirmative (App. 39). Smith got into petitioner's auto-

mobile, discussed price and then paid petitioner $15 for six tablets (App. 39–40). During the time when Smith and petitioner were together, they were under observation by Wilkie and Cherry. No other person came in contact with Smith (App. 23, 24, 31–32, 34–35). After Smith alighted from petitioner's car, he gave the tablets to Wilkie (App. 32, 41). A search of Smith showed that the $15 advanced to him was gone (App. 85). Later analysis showed that the tablets contained pantopon hydrochloride, basically impure morphine hydrochloride, a narcotic drug (App. 138).

Count 2: On October 28, 1959, petitioner offered to sell Smith a bottle of morphine atropin hydrochloride, but Smith said he wanted cocaine instead, for which the agreed price was $25 (App. 41–42). On October 29, 1959, Wilkie and Cherry again searched Smith, found no narcotics and no order forms, and gave him $30 in government funds, having recorded the serial numbers (App. 25, 33, 42–43). While seated in the petitioner's car, Smith paid petitioner $25 for a bottle labelled "cocaine alkaloid" (App. 44, 85). During the time petitioner and Smith were together, they were under constant surveillance. No other person came in contact with Smith (App. 25–28, 33–34, 35). After Smith left petitioner's car, he gave the bottle to Wilkie, who searched Smith and found that he had no narcotics and only $5 of the $30 left (App. 44, 85, 107–108).[3] Analysis showed

[3] On November 2, 1959, petitioner, in exchanging a number of bills at a bank, turned in one of the marked $5 bills used by Smith in making his $25 payment for the cocaine (App. 87, 102–103).

that the bottle contained 100% cocaine, a narcotic drug (App. 144–145, 148).

Smith testified that prior to October 15 and October 29, 1959, he had purchased narcotics from petitioner (App. 71, 77, 78).

2. After the government had rested its case and counsel approached the bench out of the hearing of the jury, the following colloquy occurred (App. 157–158):

> THE COURT: I would deny each of the motions for a judgment of acquittal.
>
> MR. LOCKYEAR [petitioner's counsel]: Your Honor, we would move for a mistrial based upon the Court's announcing that in the presence of the jury.
>
> THE COURT: All right, you make your record.
>
> MR. LOCKYEAR: The defendant would move for a mistrial at this time and ask that the Court dismiss the jury for the reason the Court has announced at the close of the evidence of the Government that both of the defendant's motions for the judgment of acquittal have been overruled, said announcement was made in the presence of the jury in open court and within their hearing.
>
> THE COURT: The motion is denied. You may proceed.

ARGUMENT

1. Petitioner challenges the constitutionality of 26 U.S.C. 4705(a) and 26 U.S.C. 4731 (*supra*, pp. 2–3), on the grounds (1) that the provision of subsection (a)(3) of Section 4731 which defines substances "chemically identical" to certain named drugs as nar-

cotic drugs is too vague and indefinite, and (2) that the provisions of Section 4731(g), including as narcotic drugs any drug found by the Secretary of the Treasury or his delegate to have "an addiction-forming or addiction-sustaining liability similar to morphine or cocaine," is an unconstitutional delegation of legislative authority (Pet. 6–9). Since petitioner's conviction does not rest on these provisions but upon subsections (a)1 and (2), he has no standing to challenge their unconstitutionality. In order to attack a statute as unconstitutional, a party must show that the alleged unconstitutional feature would result in direct injury to him. *E.g., Premier-Pabst Co.* v. *Grosscup,* 298 U.S. 226, 227; *Massachusetts* v. *Mellon,* 262 U.S. 447, 488.

2. There is no merit to the contention that the court committed reversible error in denying petitioner's motions for judgment of acquittal at the end of the government's case in the presence and hearing of the jury (Pet. 9–10). See the Statement, *supra,* p. 6. The announcement that the court "would deny each of the motions for a judgment of acquittal" (App. 157) was not an opinion that petitioner was guilty.[3] It was directed to counsel, not to the jury, and was merely a ruling that there should be no acquittal at that particular stage of the trial. Thereafter petitioner proceeded with his defense (App. 158–174).

Moreover, whatever effect on the jury the court's

[3] This situation is entirely unlike that in *Breese* v. *United States,* 108 Fed. 804, 805 (C.A. 4), where the judge in his direct charge to the jury stated "that, in his opinion, it was the duty of the jury to convict the defendant."

announcement might have had was clearly offset by the following statement in the court's final charge (App. 197–198):

> If I have said or done anything which has suggested to you that I am inclined to favor the claims of or positions of either side, you will not suffer yourselves to be influenced by any such suggestion. I have not expressed, nor have I intended to express, any opinion as to what witnesses are or are not worthy of credence, or what inference or inferences should be drawn from the evidence adduced in this case.

3. Finally, contrary to petitioner's assertion (Pet. 10–13), there was no entrapment as a matter of law. Unlike *Sherman* v. *United States,* 356 U.S. 369, where there were a number of repetitions of the request before the accused sold narcotics to the informer, in the present case, the special employee Smith, who had made previous purchases from petitioner, found no need to use persuasion to get petitioner to sell him the narcotics specified in the indictment.

Nor is it material that Smith wanted to "get" the petitioner on a federal narcotics charge or that Smith was released from jail on a State narcotics charge, which was left pending. Smith, in acting for the government agents, did not implant into the mind of an innocent person the idea of committing the crimes; rather, as a ready and willing participant, he merely afforded petitioner opportunities to make the illegal sales. Thus, the entrapment issue was properly submitted to the jury under correct instructions (App.

184–185), to which no objection was made. Cf. *Masciale* v. *United States*, 356 U.S. 386; *United States* v. *Stocker*, 273 F. 2d 754, 756 (C.A. 7), certiorari denied, 362 U.S. 963.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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